IN THE
SUPREME COURT OF MISSOURI

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No. SC84617

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SHELTER MUTUAL INSURANCE COMPANY,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

———————————

PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE WILLARD C. REINE, COMMISSIONER

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APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from a decision of the Administrative Hearing Commission (AHC), rendered under § 621.050, RSMo 2000, finding that Respondent, Shelter Mutual Benefit Insurance Company (Shelter), was entitled to a refund of sales taxes that it had previously remitted to the Director of Revenue.

Shelter, which owned and operated a cafeteria located in a restricted-access office building on the grounds of its corporate headquarters, sought a refund of sales taxes it had collected on sales of meals and drinks made in its cafeteria. The AHC determined that these sales were not taxable under § 144.020.1(6), RSMo Supp. 2001, which taxes sales made in places in which meals or drinks are regularly served to the public, because Shelter owned and operated the cafeteria. This case, therefore, involves the construction of a state revenue law.

Alternatively, if this Court determines that Shelter is entitled to a refund, then it must determine whether this refund should be offset by the amount of sales tax Shelter avoided by issuing resale certificates to the sellers from whom it purchased the food and drink that it ultimately sold in its cafeteria.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. MO. CONST. art. V, § 3; § 621.189, RSMo Supp. 2001.

STATEMENT OF FACTS

Shelter is a mutual benefit insurance company with its main office and corporate headquarters in Columbia, Missouri (L.F. 9; Joint Stip., ¶ 1). From October 1995 to March 1999 (the tax period at issue here), Shelter owned and operated a cafeteria in a large office building located on the grounds of its corporate headquarters (L.F. 9-10; Joint Stip., ¶ 4). The office building was accessible only to Shelter's employees and authorized visitors (L.F. 9; Joint Stip., ¶ 5). Shelter restricted access to the building by the use of key cards issued only to its employees (L.F. 9-10; Joint Stip., ¶ 5). Employees could also enter the building through a reception area by showing credentials identifying them as an employee (L.F. 9-10; Joint Stip., ¶ 5). Visitors were permitted to enter the building if signed in by an employee, who then escorted the visitor through the building (L.F. 9-10; Joint Stip., ¶ 5).

The cafeteria operated during Shelter's normal business hours and served meals prepared by Shelter's cafeteria workers, though a small percentage of sales involved prepackaged items (L.F. 10; Joint Stip., ¶ 6-8). Shelter's cafeteria served hot meals (meats, potatoes, vegetables, and soups), salads, sandwiches, desserts, and drinks (fountain sodas, coffee, and milk) (L.F. 10; Joint Stip., ¶ 7). Cafeteria patrons, visitors included, paid for their own meals (L.F. 10; Joint Stip., ¶ 9; Tr. 9-10). Although it charged more for the food and drink sold in the cafeteria than what it had paid for it, Shelter "subsidized" the cost of running its cafeteria in the sense that the amount it charged for meals and drinks did not completely cover the cost of operating the cafeteria (L.F. 10 and 14 n.5; Joint Stip., ¶ 9). Shelter's gross receipts from its cafeteria sales ranged from thirty to fifty thousand dollars

a month (Joint Stip., Ex. A).

Shelter avoided paying sales tax on its purchases of food and drink that it ultimately sold in its cafeteria by issuing resale certificates to the sellers (L.F. 10-11; Joint Stip., ¶ 10). Shelter collected sales tax from its cafeteria customers on their purchases of meals and drinks made in Shelter's cafeteria (L.F. 10-11; Joint Stip., ¶ 10, Ex. A).

This case began when Shelter sought a refund of the sales tax it had collected from its cafeteria customers and remitted to the Director from October 1995 through March 1999 (L.F. 11; Joint Stip., ¶ 12, Ex. A). The Director denied Shelter's refund claim (L.F. 11; Joint Stip., ¶ 13, Ex. B).

Shelter then filed a complaint with the AHC contesting the Director's decision on the sole ground that its cafeteria sales were not taxable because the cafeteria was not a place in which meals and drinks were regularly served to the public (L.F. 11; Joint Stip., ¶ 12, Ex. C). The AHC found that Shelter's cafeteria sales were not taxable under § 144.020.1(6) and that Shelter was entitled to a refund of $110,053.97, plus interest (L.F. 16). The AHC refused to offset Shelter's refund by the amount of sales tax that Shelter avoided by issuing resale certificates on its purchases of food and drink (L.F. 16). The Director appeals that decision to this Court.

POINTS RELIED ON

I.

The AHC erred in awarding Shelter a refund of the sales tax that Shelter's cafeteria customers paid on their meal and drink purchases and in holding that Shelter's cafeteria sales were not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under § 144.020.1(6), RSMo Supp. 2001, which taxes sales in places in which meals and drinks are regularly served to the public, and *J.B. Vending v. Director of Revenue* in that: 1) Shelter's cafeteria sold meals and drinks to anyone who gained access to Shelter's office building; 2) the fact that Shelter restricted access to the building in which its cafeteria was located did not mean that its cafeteria was not serving the public; and, 3) Shelter's employees and authorized visitors who patronized Shelter's cafeteria constituted a segment of the public.

J.B. Vending Co. v. Director of Revenue,

54 S.W.3d 183 (Mo. banc 2001);

St. Louis Country Club v. Administrative Hearing Comm'n,

657 S.W.2d 614 (Mo. banc 1983);

Westwood Country Club v. Director of Revenue,

6 S.W.3d 885 (Mo. banc 1999);

Wilson's Total Fitness Center, Inc. v. Director of Revenue,

38 S.W.3d 424 (Mo. banc 2001);

Section 144.020.1, RSMo Supp. 2001.

II.

The AHC erred in refusing to offset Shelter's refund request by the amount of sales tax Shelter avoided by issuing resale certificates on its purchases of food and drink it ultimately sold in its cafeteria because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and under § 144.190, RSMo Supp. 2001, a refund claim must be offset by the amount of taxes owed by the claimant in that: 1) this statute authorizes the AHC to offset Shelter's refund amount by the amount of any taxes Shelter owes; and, 2) if Shelter's cafeteria sales are determined to be exempt from tax, then Shelter was not entitled to the resale exemption on its food and drink purchases and, therefore, owes the State sales tax on those purchases.

Jones v. Director of Revenue,

981 S.W.2d 571 (Mo. banc 1998);

Westwood Country Club v. Director of Revenue,

6 S.W.3d 885 (Mo. banc 1999);

Section 144.190.2, RSMo Supp. 2001;

Section 144.210.1, RSMo 2000;

Section 144.220.3, RSMo 2000.

ARGUMENT

I.

The AHC erred in awarding Shelter a refund of the sales tax that Shelter's cafeteria customers paid on their meal and drink purchases and in holding that Shelter's cafeteria sales were not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under § 144.020.1(6), RSMo Supp. 2001, which taxes sales in places in which meals and drinks are regularly served to the public, and *J.B. Vending v. Director of Revenue* in that: 1) Shelter's cafeteria sold meals and drinks to anyone who gained access to Shelter's office building; 2) the fact that Shelter restricted access to the building in which its cafeteria was located did not mean that its cafeteria was not serving the public; and, 3) Shelter's employees and authorized visitors who patronized Shelter's cafeteria constituted a segment of the public.

Shelter owns and operates a cafeteria located in its corporate headquarters building. This building was accessible only to Shelter's employees and authorized visitors, but anyone who gained access to the building could patronize the cafeteria. Section 144.020.1(6), RSMo Supp. 2001, which imposes a tax on sales made in places in which "meals or drinks are regularly served to the public," was construed in *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183 (Mo. banc 2001), as imposing a tax even when a place, as a consequence of being located in a building to which a third party has restricted access,

sells meals and drinks only to a segment of the public. Is Shelter's cafeteria not serving a segment of the public simply because Shelter itself has restricted access to the building in which its cafeteria is located?

1. Standard of Review

The AHC's decision must be upheld when authorized by law, supported by competent and substantial evidence upon the record as a whole, and not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo 2000. This Court owes no deference to the AHC's decisions on questions of law, which are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Econ. Dev.*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Serv. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993). In this case, Shelter had the burden of proving that it was entitled to a refund (L.F. 11). Sections 136.300 and 621.050.2, RSMo 2000

2. The AHC Misinterpreted And Misapplied This Court's Opinion In *J.B. Vending*.

The statute the AHC construed in this case broadly authorizes a sales tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Section 144.020.1, RSMo Supp. 2001. The statute then divides these sales into several categories pertaining to sales of either personal property or a taxable service and sets a specific tax rate for each category. *J.B. Vending*, 54 S.W.3d at 188. Those categories include the one at issue in this case, which taxes the sales of meals and drinks at places that regularly serve the public:

> A tax equivalent to four percent on the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, motel, tavern, inn, restaurant, eating house, drugstore, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public.

Section 144.020.1(6). The purpose of § 144.020 is to broadly tax all sales of tangible personal property or taxable services and identify specific tax rates applicable to particular types of sales:

> Considered in context, the statute as a whole evinces a legislative intent to tax all sellers for the privilege of selling tangible personal property or rendering a taxable service. The purpose of the specific subsections thereunder is to set out the types of retail sales and services that shall be taxed at particular rates.

J.B. Vending, 54 S.W.3d at 188.

The AHC's misapprehension of this Court's holding in *J.B. Vending* led it to wrongly conclude that Shelter's cafeteria sales were not taxable. In *J.B. Vending*, a food-service company entered into contracts to operate cafeterias on the premises of several manufacturing or business facilities. *Id.* at 184. The cafeterias were located in buildings in which access was restricted to employees and authorized visitors. *Id.* But anyone who gained access to the building could purchase meals and drinks in these cafeterias. *Id.* at 185.

The food-service company sought a refund from the Director of the sales taxes that it had collected from its cafeteria customers. *Id.* It argued that its cafeteria sales were not

taxable under § 144.020.1(6), because the cafeterias were located in buildings in which access was restricted to employees and authorized visitors. *Id.* The company, and ultimately the AHC, thus concluded that the sales of meals and drinks in these cafeterias were not taxable because they did not occur in a place that regularly served the public. *Id.*

This Court rejected that argument and held that the word "public," as used in the statute, did not require that the entire populace have access to the cafeteria to make its sales taxable. "[A]n entity can be said to serve the public even if it serves only a subset or segment of the public." *Id.* at 186. This Court held that interpreting § 144.020.1(6) as providing a tax exemption under these circumstances would be contrary to the broad reach of the sales tax:

> It would be inconsistent with the broader legislative purpose of section 144.020 to read subsection 144.020.1(6) as if it granted an exemption from sales tax for all sales of meals and drinks that the entire populace might not be able to buy at any particular time . . . .

Id. at 188. This Court also warned that its previous cases should not be interpreted to hold that sales to any restricted segment or subset of society do not constitute sales to the public. *Id.* (discussing *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) and *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999)).

Despite this Court's holding in *J.B. Vending*, the AHC concluded that Shelter's cafeteria sales were not taxable because Shelter's cafeteria was not a place that regularly

served the public (L.F. 15). The AHC distinguished this case from *J.B. Vending* solely on the ground of ownership, i.e., "Shelter owns, operates, staffs, and subsidizes the cafeteria on its own restricted business premises" (L.F. 13).

While this may be a difference between this case and *J.B. Vending*, the AHC failed to properly analyze whether that difference had any bearing on the tax issue. In fact, a close reading of *J.B. Vending* reveals that the mere fact that an employer may own and operate the cafeteria is not sufficient to exempt sales in that cafeteria from tax. Neglecting the broad taxing provisions contained in § 144.020 (as evidenced by this Court's opinion in *J.B. Vending*), the AHC, nevertheless, carved out a tax exemption for sales made in cafeterias located in restricted-access buildings that are owned by the same entity that operates the cafeteria.

Ironically, the *J.B. Vending* opinion suggests that this is not a valid basis on which to exempt a cafeteria's sales from tax. In that opinion, this Court stressed that simply because only a segment of the public could gain access to a cafeteria does not mean that it is not a place regularly serving the public. 54 S.W.3d at 187-88. Otherwise, almost no sales would fall under the statute since there are always limitations placed on the public's access to any eatery. *Id.* at 189. This Court concluded that the General Assembly did not intend a construction of the statute that would exempt a substantial number of sales from tax:

> The legislature instead intended that all retail sales of personal property and taxable service be taxable. To construe the word "public" in a manner that will render the majority of such sales of meals and drinks untaxable is inconsistent with the

legislative purpose.

Id. at 189.

In its attempt to distinguish this case from *J.B. Vending*, the AHC simply listed differences without considering how they related to the taxing statute or what impact they had on the taxability of Shelter's cafeteria sales. To be sure, in *J.B. Vending* the seller's primary business was food service, it held itself out to the public as willing to perform such services, its cafeteria sales were to persons other than its own employees, and it did not impose the access restrictions on the buildings in which its cafeterias operated. While these facts may have reinforced the conclusion that the cafeteria sales in *J.B. Vending* were taxable, they were not, by themselves, controlling.

The fact that Shelter owned and operated a cafeteria located on its premises did not render Shelter's cafeteria sales exempt from tax. Shelter's cafeteria sold food to whomever gained access to its building, whether employee or visitor. The employees and authorized visitors that patronized Shelter's cafeteria are neither legally nor factually different than the employees and authorized visitors who patronized the cafeterias in *J.B. Vending*. The sales made to both groups are taxable.

Moreover, the fact that Shelter was primarily selling to its own employees is not a factor distinguishing this case from *J.B. Vending*. In that case, this Court expressly refused to decide that sales made to a cafeteria operator's own employees are not taxable. 54 S.W.3d at 189. As a matter of fact, a fair reading of the opinion casts considerable doubt on this premise.

First, as mentioned above, this Court stressed that its previous cases should not be interpreted to hold that sales to any restricted segment or subset of society do not constitute sales to the public. 54 S.W.3d at 186. Second, this Court emphasized that its holding in *Greenbriar*–that a country club's sale of food and drink to its own members did not constitute sales to the public–was mere dicta because the Director in that case had conceded the issue. *Id.* And third, as a reason for rejecting the tax exemption argument, this Court noted that a restaurant owner could avoid tax liability by setting limiting criteria for entering the building, and it cited as a specific example a requirement that the person be an employee who worked in the building:

> In fact, . . . the owner of a restaurant could avoid sales tax any time a building owner set a limiting criterion for entering the building–and it would not matter whether that criterion was *being an employee who worked in the building*, wearing business attire, being over a set age, or meeting some other criterion.

Id. at 188 (emphasis added). This Court feared that granting a tax exemption based on such a strained interpretation of the word "public" would undoubtedly lead to tax avoidance.

Cafeterias or restaurants that sell to any subset or segment of the populace, whether the restrictions on who may patronize these eateries are imposed by the cafeteria operator or some other third party, still constitute places in which meals or drinks are regularly served to the public. Shelter's employees and visitors are still part of the public whether they purchase meals and drinks from Shelter or from some other restaurant. By deciding to operate a cafeteria, even if its purpose is to serve only Shelter's employees and authorized

visitors, Shelter is still competing with the other restaurants and cafeterias its employees would surely patronize if not for the existence of Shelter's cafeteria.

Why should those other cafeterias or restaurants be responsible for collecting tax, but not Shelter? The short answer is that Shelter, the seller in *J.B. Vending*, as well as other restaurants not located in restricted-access buildings are all places that regularly serve the public. The legislature did not intend to stifle the creation or growth of taxable businesses, provide an unfair tax advantage, or promote a tax-avoidance scheme for restricted-access or employer-owned cafeterias.

The fact that Shelter "subsidized" its cafeteria is also irrelevant in determining whether Shelter's cafeteria sales were taxable. Setting aside the illogic in the premise that a person or company can subsidize itself, it was Shelter that decided how much it charged for meals and drinks. If it charges less than what it believes is the total cost of operating the cafeteria, then it is free to do so. The "subsidy" Shelter gave its own cafeteria is not materially different than the "subsidies"–in the form of equipment and physical facilities– that the employers and building owners in *J.B. Vending* provided to their cafeterias, the operation of which they contracted to a food-service company.

This same analysis also applies with respect to the fact that Shelter operated its cafeteria for the convenience of its employees. Although this may be true, it does not discount the fact that Shelter benefitted from its cafeteria operation as well. The mere fact that Shelter maintained the cafeteria is proof enough that it benefitted from its operation. *Compare St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W.2d 614 (Mo.

banc 1983) (the mere fact that a private country club admitted guests to its premises showed that the club and its members benefitted from the practice). The employers in *J.B. Vending* maintained cafeterias for the convenience of their employees as well, a conclusion that is not modified by the fact that they contracted out the operation of their cafeterias.

Moreover, a fair inference from the record, as well as common sense, supports a conclusion that Shelter itself benefitted from its cafeteria operation. In today's world, one can safely assume that no company–especially an insurance company– capriciously spends money without benefit to the corporation. Shelter benefitted itself in at least two ways.

First, making a cafeteria conveniently available to employees likely helped Shelter in retaining and recruiting workers. Second, Shelter increased the productivity of its employees and minimized their time away from work by operating a cafeteria in the same office building where its employees were housed. Without the cafeteria, Shelter employees, who might have otherwise purchased meals in Shelter's cafeteria, would be forced to leave Shelter's premises to buy and eat lunch, undoubtedly paying sales tax to do so.

3. The AHC's Decision Creates Uncertainty Which Will Spawn More Litigation.

The AHC's decision here offers nothing more than a fragmented, piecemeal approach to tax administration. The sales made in this case are no less taxable than those made in *J.B.Vending*. No sound construction of the taxing statute, much less rational tax policy, compels a result in which employees or visitors of companies that have contracted out the operation of their cafeterias must pay sales tax, while employees or visitors of

companies that operate their own cafeterias do not. The AHC's decision simply invites more litigation to determine, on a case-by-case basis, which restaurants or cafeterias regularly serve the public and which do not.

In the future, the Director, the AHC, and ultimately this Court will be called on to decide the type and extent of access restrictions or ownership that will determine when a place does or does not regularly serve the public. This Court acknowledged as much in *J.B. Vending* when it observed that a concession stand operator in a sports stadium could claim that it does not regularly serve the public because its patrons must have tickets to enter the arena. 54 S.W.3d at 188. Health clubs requiring a membership, as well as bars and taverns that limit access to persons over twenty-one years old, could claim that their meal and drink sales are tax-exempt. Casinos and adult cabarets who sell meals and drinks could claim that their sales are tax-exempt not because of self-imposed restrictions, but because of government age restrictions on their patrons. See §§ 313.817.4 and 573.507, RSMo 2000.

Although many sales tax issues are fact-bound inquiries not readily resolvable by application of a bright-line rule, this case is different. This Court has the opportunity to adopt a rule taxing all sales of meals and drinks in restaurants (or cafeterias) that serve any segment of the public regardless of any restrictions imposed either on access to the restaurant itself or on the persons whom the restaurant serves. Such a rule would also definitively correct any lingering misapprehension of the holdings in *Greenbriar* and *Westwood* by emphasizing that "sales to any restricted segment or subset of society" still

constitute sales to the public under § 144.020.1(6). *See J.B. Vending*, 54 S.W.3d at 186.

If the AHC's approach is adopted, this Court will find itself on the same slippery slope that it was following its decision in *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806 (Mo. banc 1998), which attempted to define the line separating exercise from recreation. In *Columbia Athletic*, this Court held that the health club involved in that case was not a place of recreation. This Court later overruled *Columbia Athletic* in *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001). In *Wilson's*, the AHC had relied on factual differences between that case and *Columbia Athletic* in determining that the health club in *Wilson's* was a place of recreation.

This Court was concerned, however, that the AHC's decision in *Wilson's* led "to the anomalous result that, in the same community, one health and fitness center's membership fees are subject to state sales tax while another health and fitness center's membership fees are not." *Wilson's*, 38 S.W.3d at 426. This Court concluded that this disparate treatment resulted from "the difficulty encountered by the AHC in attempting to sift through such details" in determining whether a health club was a place of recreation.

Although this Court's decision in *J.B. Vending* did not require it, the AHC fell into the same trap that it did in *Wilson's* by attempting to base its decision on factual differences between Shelter's cafeteria and the ones at issue in *J.B. Vending*. To compound its error, the AHC relied on factual differences that had no bearing on the ultimate taxability of Shelter's cafeteria sales. This Court should reject the holding that, in the same community, one "employee" cafeteria must charge sales tax, while another does not.

II.

The AHC erred in refusing to offset Shelter's refund request by the amount of sales tax Shelter avoided by issuing resale certificates on its purchases of food and drink it ultimately sold in its cafeteria because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and under § 144.190, RSMo Supp. 2001, a refund claim must be offset by the amount of taxes owed by the claimant in that: 1) this statute authorizes the AHC to offset Shelter's refund amount by the amount of any taxes Shelter owes; and, 2) if Shelter's cafeteria sales are determined to be exempt from tax, then Shelter was not entitled to the resale exemption on its food and drink purchases and, therefore, owes the State sales tax on those purchases.

In the event this Court determines that Shelter is entitled to a refund, then it must address the issue of whether Shelter's refund claim should be offset by the amount of tax Shelter avoided by issuing resale certificates. The AHC refused to offset Shelter's refund by the amount of sales tax Shelter avoided on its food and drink purchases by issuing resale certificates, even though Shelter was not entitled to the resale exemption on its purchases if its cafeteria sales were not taxable. Section 144.190.2 requires that any refund to which a taxpayer is entitled must be offset by any taxes owed by the taxpayer. Should Shelter's refund be offset by the amount of sales tax Shelter owed, but improperly avoided by issuing resale certificates?

1. The AHC Had Authority To Offset Shelter's Refund By The Taxes Shelter Avoided On Its Food And Drink Purchases.

The AHC refused to offset Shelter's refund claim by the amount of sales tax Shelter avoided by issuing resale certificates to the sellers from whom it purchased food and drink that it ultimately sole in its cafeteria. The AHC did not have authority to make "assessments of taxes *ab initio*," even though the parties stipulated that Shelter's sales tax liability on its food and drink purchases was $50,456 (L.F. 11; Joint Stip., ¶ 11). The AHC's refusal to offset Shelter's refund is inconsistent with the AHC's own precedent, upheld by this Court. The AHC had authority to offset Shelter's refund by the amount of sales tax Shelter avoided by issuing resale certificates.

Section 144.190.2, RSMo Supp. 2001, permits a taxpayer to collect a refund only after any taxes due from that person are deducted from the refund amount:

> If any tax, penalty, or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

This statute implicitly requires–not just permits– the AHC to determine "any taxes then

due."

2. The AHC Ignored Its Statutory Duty To Offset Shelter's Refund By The Sales Tax Shelter Improperly Avoided.

Under the AHC's decision, Shelter avoids paying tax entirely. It paid no sales tax on its cafeteria sales, and it paid no sales tax on its food and drink purchases. Under the law, Shelter owed sales tax on its purchases if its cafeteria sales were not taxable. Fairness and efficient tax administration require that Shelter's refund, if indeed it is entitled to one, must be offset by the amount of sales tax Shelter avoided.

A. Shelter Owed Sales Tax On Its Purchases.

Shelter avoided sales tax on its purchases by issuing resale certificates to the sellers from whom it purchased the food and drink that it ultimately sold in its cafeteria. Shelter's issuance of these certificates was, in effect, a claim that its purchases were not taxable sales at retail because Shelter intended to resell the food and drink items to its cafeteria customers, from whom it would collect sales tax. See § 144.010.1(10), RSMo Supp. 2001.

Under § 144.210.1, RSMo 2000, "when a purchaser has purchased tangible personal property or services sales tax free under a claim of exemption which is found to be improper, the director of revenue may collect the proper amount of tax, interest, additions to tax and penalty from the purchaser directly." In this case, the purchaser is Shelter and the Director may collect the sales tax directly from Shelter as the issuer of the exemption certificate.

That authority was confirmed in *Westwood*. There, this Court held that if there is no

sale at retail, then the resale exclusion, which excludes from sales tax any purchase of tangible personal property that is intended to be resold, does not apply. *Westwood*, 6 S.W.3d at 888. In *Westwood*, the taxpayer was a private country club that was not liable, under this Court's holding in *Greenbriar*, for sales tax on the meals and drinks it sold in its restaurant. *Id.* at 886. Shelter is making the same claim in this case. In *Westwood*, the taxpayer did not pay sales tax on its purchases of food and drink that it later sold tax-free in the form of meals in its restaurant. *Id.* The taxpayer claimed that its purchases were excluded from sales tax because it resold the food and drink in its restaurant. *Id.* at 886-87.

This Court held that there must be a "sale at retail" before the resale exclusion could apply. *Id.* at 887. Because the sales made in the country club's restaurant were not taxable under this Court's decision in *Greenbriar*, this Court held that the country club must pay sales tax on its purchases of food and drink. *Id.* at 887-88. This same reasoning applies to Shelter's cafeteria sales, because it too claims that its meal and drink sales were not taxable under section 144.020.1(6). Consequently, Shelter is liable for the sales tax that it improperly avoided by issuing resale certificates to the sellers who sold it food and drink that Shelter ultimately sold in its cafeterias.

B. The Offset Is Required By Fairness and Efficient Tax Administration.

This interpretation of the law is reinforced by fairness and efficient tax administration. Equity demands that Shelter's sales tax liability should offset its refund claim for the sales tax its customers paid on their purchases of meals and drinks from Shelter's cafeteria. The AHC did not deny the equities but suggested that the Director

"conduct an audit and determine the proper amount" of sales tax Shelter owes on its purchases. This holding, of course, completely ignores the fact that the parties stipulated to the amount of sales tax Shelter avoided (Joint Stip., ¶ 11). The AHC even included a finding of fact in its decision identifying this amount (L.F. 11).

The AHC's refusal to offset Shelter's refund also ignores the three-year statute of limitations contained in § 144.220.3, RSMo 2000. The time in which to assess unpaid sales tax against Shelter on its purchases of food and drink has already passed. If the amount of Shelter's refund is not offset by the sales tax Shelter avoided, then Shelter will reap a windfall by avoiding the taxes it owed on its own purchases of food and drink and by collecting a refund of the sales taxes that Shelter's cafeteria customers paid for their meal purchases.

The AHC's decision provides taxpayers with an incentive to adopt a tax-planning strategy in which they purchase goods tax-free under a claim of exemption and then later, after the statute of limitations is set to expire, seek a refund of the amount of sales tax that they collected on the resale of those goods. The incentive to issue questionable exemption certificates to further this strategy would also increase.

The AHC failed to recognize the fundamental unfairness to the state and other taxpayers by allowing a taxpayer to claim a refund without offsetting that refund by the amount of taxes the taxpayer would have otherwise paid if the ultimate sale was not taxable. The state does not have the resources to conduct audits on every refund claim to determine if taxes are due if the refund claim succeeds. Moreover, the efficiency of the

administrative process is certainly not enhanced by such a scheme. The legislature recognized this in crafting § 144.190.2 to require that any refund amount be offset by any taxes owed to the state.

The circumstances here are similar to those addressed by this Court in *Jones v. Director of Revenue,* 981 S.W.2d 571 (Mo. banc 1998). There, the Director assessed an individual taxpayer, as a responsible party, for a corporation's failure to pay sales tax. The taxpayer sought to offset the tax assessment by the amount of sales tax that he claimed the corporation erroneously paid on component parts, which should have been exempt from tax. The taxpayer, however, had not filed a refund claim for the taxes the corporation had erroneously paid. But this Court held that the AHC had authority to credit the taxpayer for the taxes erroneously paid by the corporation.

If the AHC can offset a tax assessment by the amount of sales tax a taxpayer erroneously paid, then it should be allowed to offset a taxpayer's refund claim by the amount of sales tax that the taxpayer improperly avoided on a related transaction through the issuance of exemption certificates. This offset is not only equitable, but it is required under § 144.190.2. By filing a refund claim for the taxes paid by its cafeteria customers, Shelter tacitly admits, under the *Westwood* holding, that it owes sales tax on its purchases of food and drink. The AHC erred by not offsetting Shelter's refund claim by the amount of sales tax it avoided by issuing exemption certificates.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Shelter's refund claim, and its decision should be reversed. Alternatively, the AHC erred in refusing to offset Shelter's refund claim by the amount of sales tax that Shelter avoided on its purchases by issuing resale certificates.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 6258 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on September 30, 2002, to:

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